No. 02-1744

IN THE

Supreme Court of the United States

WAYNE A. YOUNG, *et al.*,

Petitioners,

v.

CITY OF JACKSONVILLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

This Court should deny the writ for three reasons. First, the Petitioners have not demonstrated any meaningful basis for conflict between the Eleventh Circuit's decision and this Court's precedents or those of other circuits. Second, the Petitioners seek review based on a factual dispute they did not challenge below and have raised for the first time in this Court. Finally, the purported importance of the Eleventh Circuit's decision on the administration of justice is not apparent.

I.

THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *CAREY* OR ANY OTHER PRECEDENT AND, IN ANY EVENT, IS AFFIRMABLE ON OTHER GROUNDS.

Petitioners' first argument is that the Eleventh Circuit ignored applicable precedents of this Court and lower federal courts in upholding the District Court's dismissal of their nominal damages claim as merely incidental to their defunct request for equitable relief (which was non-justiciable because the challenged program, *Secrets of Successful People*, had been discontinued a year prior to their lawsuit having been filed).

The Petitioners claim that the Eleventh Circuit's opinion conflicts with this Court's decision in *Carey v. Piphus*, 435 U.S. 247 (1978), as well as other federal appellate decisions. The Eleventh Circuit's unpublished decision,[1] however, raises

1. Petitioners attack the Eleventh Circuit's opinion as "conceived . . . in the shadows, suggesting its effect will extend no further than the unfortunate subjects of its illicit decree[.]" Petition (Cont'd)

no meaningful issue of importance for this Court's review based on conflict or otherwise. *Braxton v. United States*, 500 U.S. 344 (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law.").

Instead, the Eleventh Circuit specifically addressed the applicability of *Carey* and noted the important distinction, recognized by other circuits, between *awarding* nominal damages where a constitutional violation is proven at trial (but no actual damages are shown) and merely *pleading* a de minimis nominal damage claim that is incidental to an equitable claim that is no longer justiciable. *See, e.g., Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378 (2d Cir 1973); *Kerrigan v. Boucher*, 450 F.2d 487 (2d Cir. 1971). The Eleventh Circuit also noted that the Petitioners' allegations raised the specter of the de minimis doctrine, which holds that a constitutional violation does not result where the alleged imposition is inconsequential. *See Ingraham v. Wright*, 430 U.S. 651, 674 (1977) ("there is, of course, a de minimis level of imposition with which the Constitution is not concerned.").

As to purported conflict, Petitioners rely on distinguishable circuit court cases in which actual and punitive damages were pleaded, *e.g., Bernhardt v. County of Los Angeles*, 279 F.3d

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(Cont'd)

at 13. Respondent suggests that this attack is unfounded. Given the existence and prevalence of unpublished opinions in the Eleventh Circuit and elsewhere, combined with the ability of litigants to cite such opinions where appropriate (*see, e.g.*, 11th Circuit Rule 36-2), they cannot be considered "illicit" as Petitioners posit. Instead, they are the product of Article III powers that are just as deserving of respect and obedience as published opinions.

862, 872 (9th Cir. 2002) ("Bernhardt's complaint seeks compensatory and punitive damages."), liability had already been found, *e.g.*, *Amato v. City of Saratoga Springs*, 170 F.3d 311, 317 (2d Cir. 1999) (error to dismiss claim against city after jury found liability and awarded nominal and punitive damages against police officers) or a passing reference was made to the principle that monetary damage claims "creat[e] a live controversy." *Mellen v. Bunting*, 327 F.3d 355, 365 (4th Cir. 2003).

Admittedly, language in the Tenth Circuit's decision in *Committee for First Amendment v. Campbell*, 962 F.2d 1517 (10th Cir. 1992) comes close to conflicting with that of the Eleventh Circuit. But, even that court understood that the holding in *Carey* is limited to the remedial stage of litigation, not the pleading stage. *Id.* at 1526-27 ("If *proven*, a violation of First Amendment rights concerning freedom of expression entitles a plaintiff to at least nominal damages.") (emphasis added).

As to Petitioners' reliance on *Carey*, in that case this Court held that students who were denied a hearing (and thereby denied an "absolute" right to procedural due process) were entitled to recover only nominal damages not to exceed one dollar. The Seventh Circuit had ruled that the students were "entitled to recover substantial nonpunitive damages" such as emotional distress "even if their suspensions were justified and even if they do not prove that any other actual injury was caused by the denial of procedural due process." *Carey*, 435 U.S. at 248. This Court disagreed and held that "in the absence of proof of actual injury, the students are entitled to recover only nominal damages." *Id.*

Properly read, *Carey* is a limitation of remedy case in which nominal damages of one dollar were appropriate under the specific constitutional claim presented (i.e., an "absolute" right to procedural due process) where proof of actual injury did not

exist. This Court did not intend its ruling to be used in an expansive way, as is argued in the instant case. In fact, this Court has limited in a significant way the manner in which *Carey* is to be interpreted. *See Memphis Community School Dist. v. Strachura*, 477 U.S. 308 (1986) (noting that "*Carey* thus makes clear that the abstract value of a constitutional right may not form the basis for § 1983 damages.").

On this point, this Court rejected the contention that damages should be presumed to flow from every type of constitutional deprivation. *Carey*, 435 U.S. at 263. In doing so, it reasoned as follows:

> More importantly, the elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another. As we have said, . . . these issues must be considered with reference to the nature of the interests protected by the particular constitutional right in question.

Id. at 265. This Court concluded that:

> Because the right to procedural due process is "absolute" in the sense that ***it does not depend upon the merits of a claimant's substantive assertions***, and because of the importance to organized society that procedural due process be observed, see *Boddie v. Connecticut*, 401 U.S. 371, 375, 91 S.Ct. 780, 784, 28 L.Ed.2d 113 (1971); *Anti-Fascist Committee v. McGrath*, 341 U.S. [123], at 171-172, 71 S.Ct., at 648-649 [(1951)] (Frankfurter, J., concurring), we believe that the denial of procedural

> due process should be actionable for nominal damages without proof of actual injury.

435 U.S. at 266-67 (emphasis added). The highlighted language makes evident that *Carey* is limited to an "absolute" constitutional right that is independent of any other substantive merits underlying a claimant's assertions. It does not extend to any and all alleged constitutional rights, and no allegation exists below that some "absolute" right was allegedly violated. As the Eleventh Circuit has recognized (and discussed in its decision below), the holding of *Carey* is not nearly as expansive as is often represented. *See, e.g., Oliver v. Falla*, 258 F.3d 1277, 1280 (11th Cir. 2001) (rejecting argument that *Carey* mandates an award of at least nominal damages for all constitutional violations such as an Eighth Amendment claim).[2] Petitioners fail to even mention the Eleventh Circuit's decision in *Oliver*, which was cited below.

Seen in this light, the decision in *Carey* supports the District Court's and Eleventh Circuit's decisions in the following way. Taking the allegations in the Petitioners' Complaint as true, they pleaded only nominal damages for an alleged violation of a purported constitutional right to be free from materials containing religious references with which they disagree. In doing so, it was reasonable to conclude that the Plaintiffs suffered no actual injury from the challenged training program. In the absence of an allegation of actual injury, the District Court was left with a non-justiciable, moot claim seeking at most a dollar's worth of relief based on a purported and unrecognized constitutional right not

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2. The Eleventh Circuit in *Oliver* specifically noted that the type of constitutional claim asserted is important in application of the holding in *Carey* by stating: "Oliver's reliance on *Carey* is misplaced for several reasons. First, *Carey* is a Fourteenth Amendment procedural due process case; Oliver alleges an Eighth Amendment violation." 258 F.3d at 1280.

to be subject to a discontinued training program, conducted only once, whose three-hour video and thirty-page booklet contained a small segment that referred to Buddhism. Under these circumstances, it is understandable that the District Court dismissed (and the Eleventh Circuit affirmed) the nominal damages claim as merely incidental to the primary claims seeking declaratory and equitable relief.

To the extent Petitioners assert that the Eleventh Circuit misapplied the holding in *Carey*, they are mistaken. As indicated above, the Eleventh Circuit clearly understood the principles of *Carey*, but distinguished that decision by noting that the Petitioners' expansive reading of that case was not reflected in the caselaw. No misapplication of *Carey* exists. In any event, a "misapplication" theory is generally a poor vehicle for certiorari review. *See* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

Finally, certiorari is improvident where a ruling – even if based on an erroneous legal theory – is supportable based on another theory asserted below. Here, the District Court was correct, either in dismissing the action because of the incidental nature of the nominal damage claim pleaded or, alternatively, for the lack of cognizable constitutional claims.[3] Either basis would be a proper one for affirmance. *Foster v. Kassulke*, 898 F.2d 1144, 1146 (6th Cir. 1990) ("[a] decision below must be affirmed if correct for any reason, including a reason not considered by

3. Respondent asserted in the District Court and the Eleventh Circuit that the Petitioners failed to plead claims for relief under the Establishment, Free Exercise, and Free Speech Clauses. Respondent asserted that Petitioners' nominal damage claims did not meet any of the three Establishment Clause tests (endorsement test, coercion test, or *Lemon* test) and did not state claims for violations of a constitutional right to exercise one's religion or free speech.

the lower court") (*quoting Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214, 216 (6th Cir. 1985)). That the Eleventh Circuit relied upon one basis for affirmance (incidental nature of nominal damage claim) does not eliminate an equally compelling basis for affirmance (lack of cognizable claim for a constitutional deprivation). For all these reasons, certiorari review would be ill advised.

II.

PETITIONERS RAISE A FACTUAL DISPUTE TO WHICH THEY DID NOT OBJECT BELOW, EITHER IN THE DISTRICT COURT OR THE ELEVENTH CIRCUIT.

Petitioners' second argument in support of certiorari is that the District Court erred in making (and the Eleventh Circuit erred in relying upon) the factual finding that the City discontinued the challenged program, *Secrets of Successful People*, a year prior to Petitioners filing their lawsuit.

Petitioners overlook that they acquiesced in these factual findings below without objection and thereby have no grounds for lodging their objection for the first time in this Court. *See, e.g., Steagald v. United States*, 451 U.S. 204, 209 (1981) (party "may lose its right to raise factual issues of this sort before this Court when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation.").

Specifically, Petitioners made no objection to the District Court's factual findings as to the discontinuation of the challenged program,[4] either in the District Court or in the Eleventh Circuit. Petitioners presented no motion for rehearing or clarification seeking to correct this alleged factual error to either of those courts. Having failed to even attempt to preserve this alleged factual error below, either in the District Court or the Eleventh Circuit, Petitioners' request for certiorari review by this Court must fail. Moreover, a run-of-the-mill dispute over factual matters is not a productive basis for certiorari review absent extraordinary circumstances, which do not exist in this case. *Cf.* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings. . . .").

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4. The District Court made the uncontested factual finding that "the program about which Plaintiffs complain ended almost a year before the commencement of the lawsuit[.]" Pet. App. 24 The District Court's order also stated that the Petitioners' complaint "reveals that Plaintiffs have not alleged any facts from which it can be reasonably inferred that Defendant continues to use the offending program. Instead, the allegations support that the program ended on September 30, 2002, almost a year before they brought this suit." Pet. App. 25 (*citing* Complaint at ¶ 20). The order also stated that "[b]ecause Plaintiffs make no allegations that Defendant plans to continue using the offending program or that Defendant intends to require Plaintiffs to participate once again in the program, there is no alleged threat of future injury warranting their need for injunctive relief." Pet. App. 25 Petitioners did not challenge any of these findings in the District Court or in the Eleventh Circuit.

III.

THE QUESTIONS PRESENTED ARE NOT WORTHY OF CERTIORARI.

Finally, Petitioners – despite their allusion to *Marbury v. Madison*, 1 Cranch 137 (1803) – have not shown an issue of importance that would justify inclusion on this Court's limited docket. As discussed above, this case presents a matter of a de minimis nature that was properly dismissed due to the lack of a justiciable controversy.

CONCLUSION

Based on the foregoing, Respondent, City of Jacksonville, Florida, respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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